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No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S REPLY IN OPPOSITION

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QUESTION PRESENTED

Where a carrier's participation in the Household Goods Carriers' Bureau Mileage Guide Tariff was cancelled, is the carrier's continued use of that tariff a violation of the filed rate doctrine?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 996 F.2d 1516. The order and decision of the United States District Court for the Eastern District of Pennsylvania (Van Artsdalen, J.) granting summary judgment for Respondent is unreported. Both decisions are reproduced in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves the application of the filed rate doctrine to rates based on mileages published by Petitioner, Security Services, Inc. f/k/a Riss International Corporation ("*Riss*"). However, Riss has the initial burden of proving it had an effective tariff on file with the I.C.C. to substantiate its undercharge claims. Riss filed a mileage rate tariff with the I.C.C. Mileage rates are composed of two components, both of which must be published in the carrier's tariff: 1) the rate per mile, and 2) a distance scale. In lieu of publishing its own distance scale, Riss opted to incorporate the Household Goods Carriers' Bureau's (HGCB) Mileage Guide Tariff No. 100 by reference thereto in its mileage rate tariff, as permitted by the I.C.C.'s tariff regulations.

The Interstate Commerce Commission's (I.C.C.) tariff regulations instruct how common carriers are to publish their rates in furtherance of the filed rate doctrine. These regulations require carriers who opt to publish rates based on mileages to also publish a distance scale in a tariff (mileage guide), and if they choose to refer to an agent's mileage tariff rather than publish their own, the carrier must participate in that mileage tariff.

Participation in joint tariffs must be accomplished by the execution of a power of attorney authorizing the publisher (agent) to list the carrier's name in the tariff as a participating carrier. The publishing agent's rules also require payment of an annual participation fee as a prerequisite to being listed as a participant. The I.C.C.'s regulations follow its 1939 directive warning carriers of

the dire consequences of failing to participate in referred-to tariffs published by agents.

Riss complied with all of the foregoing requirements until Feb. 19, 1985, when the Household Goods Carriers' Bureau deleted Riss from its Mileage Guide Tariff No. 100 for failure to pay the participation fee.[1] Riss's mileage rate tariff remained in effect *but was incapable of calculating freight charges thereafter due to the absence of a distance scale tariff filed with the I.C.C. in its name*. Stated differently, when Riss's participation in the HGCB Mileage Guide Tariff was terminated, its mileage rate tariff became incomplete, and thus void by operation of law.

The Third Circuit's decision below held that Riss lacked a complete tariff, and also upheld the I.C.C.'s power to promulgate the regulations declaring as void tariffs that are materially incomplete. That decision was the third decision by a Federal Circuit Court to do so.[2]

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[1] Several other carriers, apparently under severe financial pressure due to increased competition, failed to pay fees to the HGCB, and were deleted from the Mileage Guide. Their Trustees are similarly seeking undercharges. See **Appendix A**.

[2] *See Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, *cert. denied*, 113 S. Ct. 979 (Jan. 11, 1993); *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993); *F.P. Corporation v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *petition for cert. filed*, No. 92-2062.

However, the D.C. Circuit Court of Appeals[3] subsequently reversed the I.C.C.'s landmark decision in *Jasper Wyman*[4] where the I.C.C. interpreted its regulations as precluding carriers' reliance upon incomplete mileage rate tariffs as the basis for undercharges. Shortly thereafter, the Seventh Circuit[5] and the Sixth Circuit[6] felt constrained to follow *Overland* because the I.C.C. is bound to adhere to the D.C. Circuit's review of its regulations.

On August 6, 1993, the I.C.C. and the United States of America petitioned the D.C. Circuit for rehearing *Overland* with a suggestion for rehearing *en banc*. On August 17, 1993, the D.C. Circuit ordered, *sua sponte*, Overland Express to respond to the Government's petition. See **Appendix B**.

Although the Government has not participated in the proceedings below, it is contesting the circuit decisions challenging the I.C.C.'s regulations governing these cases. Therefore, the Court may deem it advisable to

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[3] *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356 (D.C. Cir. June 22, 1993), *rev'g. sub nom., Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 246 (Jan. 30, 1992).

[4] *Jasper Wyman & Son et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 313 (March 9, 1992).

[5] *Brizendine v. Cotter & Company*, ___ F.2d ___, 1993 WL 292348 (7th Cir. Aug. 5, 1993).

[6] *Security Services, Inc., f/k/a Riss International Corporation v. P-Y Transportation, Inc., f/k/a C.T.S. Brokerage, Inc.*, ___ F.2d ___, 1993 WL 325719 (6th Cir. Aug. 30, 1993) ("P-Y").

invite the Solicitor General to submit the Government's position on this case of first impression.

The Court may also wish to await the D.C. Circuit's disposition of the Government's petition for rehearing in *Overland* before acting on the instant petition.

ARGUMENT

I. AN INCOMPLETE TARIFF IS VOID AS A MATTER OF LAW.

Riss's trustee in bankruptcy is seeking approximately $555,000 in additional freight charges alleged to be due by application of its common carrier mileage rate tariff rather than contract[7] rates negotiated with and paid by K Mart between Nov. 3, 1986 and Dec. 29, 1989. However, the Trustee must first prove that Riss had a valid tariff on file with the I.C.C. *Carrier Traffic Service, Inc., v. Toastmaster, Inc.*, 707 F. Supp. 1498 (1989); *Vertex Corp. – Petition for Declaratory Order – Certain Rates and Practices of Southwest Equipment Rental, Inc. D/B/A Southwest Motor Freight*, 8 I.C.C.2d 701 (1992), 9 I.C.C.2d 688 (1993).

Riss's mileage rate tariff referred to the HGCB's Mileage Guide Tariff No. 100 filed with the I.C.C. as the uniform source for distances between the origins and

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[7] The courts below did not rule on Defendant/Respondent's defense that Riss performed these transportation services under its contract permit pursuant to a duly executed transportation contract. Summary judgment was granted solely on the Mileage Guide Tariff issue.

destinations served by Riss.[8] The I.C.C.'s tariff regulations require carriers choosing to publish rates in "cents per mile" to also publish a distance scale in a tariff. 49 C.F.R. § 1312.30(b). The object is to prevent discrimination and secret pricing made possible by applying shorter mileage routes for favored shippers. *Security Services, Inc. f/k/a Riss International Corp. v. K Mart Corp.*, 996 F.2d 1516 (3rd Cir. June 18, 1993) ("*K Mart*").

Although Riss originally participated in the HGCB Mileage Guide Tariff when it filed its mileage rate tariff ICC RISS 501-B effective Sept. 30, 1984, its name was deleted from HGCB's filed tariff listing of participating carriers in HGCB's Mileage Guide effective Feb. 19, 1985 due to its failure to pay the required participation fee for 1985. *Id.* at 1520, 1526. Respondent contends that as of that date, Riss's mileage rates became incomplete and thus, ineffective by operation of law. The Circuit Court below agreed, holding that:

> When a common carrier elects to file a distance rate tariff, as did Riss, it must provide **both** components to allow a shipper to calculate transportation costs for a given shipment. If a tariff is incomplete ~~because~~ one or the other of these components is missing, the shipper cannot put the tariff to its intended use.

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[8] The Circuit Court below held that the HGCB's Mileage Guide "is deemed a tariff in its own right," citing *Jasper Wyman* and *Freightcor. Security Services, Inc. f/k/a Riss International Corp. v. K Mart Corp.*, 996 F.2d 1516, 1521 (3rd Cir. June 18, 1993) ("*K Mart*").

Id. at 1521 (emphasis added). The Court then held:

> . . . Riss's tariff was missing one entire and essential component of the two necessary to satisfy the fundamental purpose of tariffs, i.e., to disclose the freight charges due the carrier. *Jasper Wyman*, 1992 WL 17399, at *7.
>
> Relying on the inference that at some time prior to HGB's cancellation on February 18, 1985, it had participated in HGB's distance guide tariff, Riss seems to argue that its former participation in the HGB tariff conferred upon it a right of perpetual participation. However, it is undisputed that Riss never transmitted any distance tariff to the Commission itself after HGB's cancellation, nor did it participate in the distance guides filed by any other carrier or agent. Consequently, Riss had **no effective tariff** by which any shipper or the Commission could ascertain its transportation charges. Riss's tariff, therefore, did not substantially comply at any time relevant to this case.

Id. at 1526 (emphasis added).

The foregoing facts and legal conclusions are simply an application of the filed rate doctrine as recently reaffirmed by this Court in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) and *Reiter v. Cooper*, 113 S. Ct. 1213 (March 8, 1993).

The Commission's tariff regulations and its interpretations thereof in *Jasper Wyman* and its progeny are merely tools designed to implement the filed rate doctrine. Pursuant to the Congressional mandate expressed in 49 U.S.C. § 10762(b)(1), the Commission prescribed "the form and manner of publishing, filing, and keeping

tariffs open for public inspection . . . " by promulgating 49 C.F.R. Sections 1312.4(d), 1312.10(a), 1312.13(c), 1312.17(a-b), 1312.18, 1312.25(a), 1312.25(d), 1312.27(e), 1312.30(b), 1312.30(c) and 1312.30(c)(4).[9] Collectively, these sections govern how carriers must lawfully publish mileage rates and participate in joint tariffs, such as the HGCB Mileage Guide Tariff, if they choose this method of publication.

The Commission's regulations thus implement the filed rate doctrine by requiring carriers to be named in tariffs publishing *both* components of their mileage rates. These regulations assuredly were not promulgated as a defense to undercharges. As early as 1939, the Commission issued a warning to carriers about the effects of being cancelled from an agency tariff for failure to pay the required participation fees.[10] When the I.C.C. becomes aware of carrier noncompliance, it reacts. *See New England Motor Carrier Rates*, 8 M.C.C. 287, 304 (1938) (prohibiting use of tariff without participation); *Halliburton Co. v. Consolidated Copperstate Lines*, 335 I.C.C. 201, 107 (1969) (lack of participation in the tariff operated to defeat an undercharge claim); *Household Goods Carriers' Bureau, Inc. – Petition for Cancellation of Tariffs of Non-Participating Carriers*, 9 I.C.C.2d 378 (1993) (order directed at 111 carriers identified by HGCB as referring to, without participating in, the HGCB Mileage Guide Tariff);

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[9] All relevant tariff regulations are reproduced in **Appendix E**, beginning at App. 12.

[10] See F.R. Doc. 39-4016(Oct 30, 1939); 4 Fed. Reg. 4440 (Oct. 31, 1939), annexed as **Appendix C**.

National Motor Freight Traffic Association – Petition for Cancellation of Tariffs That Refer to the N.M.F.C. Classification, But Are Filed By or On Behalf of Non-Participating Carriers, 9 I.C.C.2d 186 (1992) (same as to 49 carriers identified as referring to, but not participating in, a commodity classification tariff filed by the National Motor Freight Classification Committee). Participation by carriers referring to the Mileage Guide Tariff was also mandated by a prominent note in the Mileage Guide Tariff.[11]

In 1984, the Commission revised its tariff regulations simplifying tariff procedures, but reiterated the requirement that carriers electing to publish mileage rates and utilize an agent's mileage guide for distances be listed as participating carriers in that mileage guide tariff.[12] 49 C.F.R. § 1312.27(e).

Absent effective powers of attorney to the publishing agent, or payment of participation fees, the tariff becomes inoperative and *the referring carrier's name will be deleted from the referred-to mileage guide tariff.* 49 C.F.R. 1312.4(d). The carrier's mileage rates then become incomplete

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[11] (From HGCB Mileage Guide Tariff, Supp. App. 41)

PARTICIPATING CARRIERS

For a list of participating carriers refer to "Participating Carrier and Scope Tariff No. ICC HGB 107-a, Household Goods Carriers' Bureau, Agent, Supplements thereto or reissues thereof.

NOTE: This mileage guide may not be employed by a carrier as a governing publication for the purpose of determining transportation rates based on mileage or distance unless carrier is shown as a participant in the above named tariff.

[12] *Ex Parte No. MC-370, Tariff Improvement*, 365 I.C.C. 43 (1981)

because a distance scale no longer exists *in the carrier's name* with which to multiply the mileage rates.

The Third Circuit affirmed the District Court's grant of summary judgment to K Mart because Riss's tariff was incomplete. To the same effect are *Freightcor*, *Atlantis* and *F.P. Corp.*

II. THE COMMISSION'S REGULATIONS REFLECT THE CONGRESSIONAL POLICY AGAINST SECRET, DISCRIMINATORY RATES

The Third Circuit recognized the potential for the discriminatory use of mileage rates in the absence of a *filed* distance scale published in the name of the carrier:

> Because the number of miles between two points will vary depending on the route chosen, specification of that number [in a tariff] precludes a carrier from favoring one shipper over another by calculating a lower charge for the favored shipper based on a shorter route. This promotes Congress's policy of preventing price discrimination.

K Mart at 1520-1521.

The reason for this requirement is succinctly explained in *Tri-State Motor Transit Co. v. U.S.*, 490 F.2d 996 (8th Cir. 1974), wherein the Court stated:

> Mileage Guide No. 8 when incorporated into the provisions of a Tariff **creates certainty** in the computation of mileage-distance from point of origin to destination. As provided in the guide, the determination of mileage made pursuant to its Rules is applicable regardless of the Route

> actually traveled by the carrier. The certainty of this method of distance-mileage computation should only be abolished by a clear and specific exception in the terms of the Tariff.

Id. at 997 (emphasis added).

Once Riss's name was deleted from the HGCB Mileage Guide Tariff, it lost the required certainty of rates mandated by the filed rate doctrine, and its mileage rates became void. The fundamental reason for these tariff regulations requiring publication and filing with the I.C.C. of *all* elements of the rate necessary for the computation of charges is to prevent opportunities for discrimination. If Riss, for instance, was not bound to apply only the distances published in the HGCB Mileage Guide Tariff 100, it would be free to give favored shippers a *reduction of $73 per truckload* simply by reducing by one mile the published distance between a given origin and destination, thus dropping the mileage rate into the lower mileage bracket.[13] The I.C.C.'s regulations, therefore, are necessary to implement the filed rate doctrine, thus preventing discrimination.

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[13] Using Riss's mileage rate scale in ICC RISS 501-B, Item 161 (annexed as **Appendix D**), the charge would be $1828 for a movement stated in the HGCB tariff to be 1,001 miles between a given origin and destination. If the carrier is not bound by this tariff-imposed distance, the carrier could use 1,000 miles, thus reducing the charge to $1755, a savings of $73 per 40,000 lb. truckload. (Joint Appendix p. 111.) The Rate Base Numbers as used in Item 161 are equivalent to the mileages shown in HGB 100, per Riss 501-B, page 11. (JA 112)

III. PETITIONER'S RELIANCE UPON THIS COURT'S DECISION IN *I.C.C. V. AMERICAN TRUCKING ASSOCIATION* IS MISPLACED

The main thrust of Petitioner's position is that this Court's decision in *I.C.C. v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("*ATA*") precludes the I.C.C. from retroactively rejecting an effective tariff. Petitioner argues that since the I.C.C. accepted Riss's mileage rate tariff for filing, it may not now declare it void by operation of 49 C.F.R. § 1312.4(d). Petitioner is wrong on two counts: 1) an *incomplete* tariff is void by reason of the carrier's omission, not by any act of the Commission; and 2) there was no cause for rejecting Riss's tariff when originally filed because Riss was a participant in the HGCB mileage Guide Tariff 100 at that time. *K Mart* at 1520, 1526. Nor was it necessary for the I.C.C. to take any action when Riss was later deleted from the Mileage Guide Tariff. Riss's mileage rates were rendered void by its agent's cancellation of a published scale of distances for Riss's account. Thereafter, Riss lacked a uniform scale of distances to be multiplied by the mileage rate to calculate total charges.

Furthermore, 49 U.S.C. § 10762(e) does not require the Commission's rejection of an incomplete tariff. The statute is merely permissive.[14]

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[14] 49 U.S.C. § 10762(e) provides that

> The Commission **may** reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section. (emphasis added)

As a practical matter, it would have been extremely difficult, and costly, for the Commission to monitor every cancellation supplement filed by the HGCB to determine whether the delinquent carriers had filed another method of computing distances simultaneously with their cancellation from HGCB 100. As the Court observed in *ATA*, at 360, n. 4, the I.C.C. discontinued scrutinizing every tariff filing in 1979 due to budget cutbacks and reductions in personnel. Given the number of participants in the HGCB Mileage Guide Tariff 100 (approximately 12,800), monitoring that tariff alone would have been a Herculean task for the Commission and an unacceptable burden on taxpayers.[15] However, this should not relieve carriers from their responsibility to comply with the I.C.A. and I.C.C. regulations.

None of the cases cited by Petitioner in support of its "retroactive rejection" argument involved *incomplete* tariffs. *Genstar Chemical, Ltd. v. I.C.C.*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1983), involved the publication of a *complete* rate which was increased 14% rather than the 12% increase authorized by the I.C.C. The Court upheld the I.C.C.'s awarding a shipper only the 2% difference rather than refunding the entire 14% contained in the defectively filed tariff. *Davis v. Portland Seed Co.*,

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[15] The obligation to police lawful participation in the HGCB Mileage Guide Tariff was on HGCB as the publisher, not the I.C.C., as the HGCB derives funds for the compilation of its voluminous Mileage Guide from its dues and participation fees. The HGCB has since recognized its obligation by petitioning the I.C.C. to strike delinquent carriers' tariffs from the I.C.C.'s files. See petitions for *Cancellation of Tariffs* cited at page 8 herein.

264 U.S. 403 (1924) involved a *complete* rate filed in violation of the long-and-short haul statute. *Berwind-White Coal Mining Co. v. Chicago & E.R.R.*, 235 U.S. 371 (1914) involved the filing of a demurrage rate sheet with the I.C.C. Since each of these cases involved *complete* rates from which freight charges were readily calculated despite their technical violations of the Commission's regulations, they are inapposite to the case at bar.

Petitioner wrongly characterizes the Fifth Circuit's decision in *Freightcor* as relying solely on the National Transportation Policy as justification for retroactively rejecting Freightcor's tariffs. On the contrary, the Fifth Circuit held:

> In sum, the congressional mandate to the ICC is that the Commission must maintain a fair and efficient transportation market, which, at the very least, does not permit secret negotiations and arrangements between carriers and shippers. Mindful of this policy, the Commission is specifically under a statutory mandate to determine what information must be provided in every joint tariff and provide mechanisms to ensure that this information is provided and is accurate. Pursuant to this obligation, we believe that there is a strong presumption that the Commission must require the disclosure of the identity of the carriers participating in every tariff.

Id. at 6738.

The Third Circuit concurred with the Fifth Circuit's analysis (*K Mart*, at 1525) and also concurred in the Fifth Circuit's finding that the I.C.C. met the second criterion:

> In fulfilling the statutory mandate, the Commission designated participation *via* concurrence or

powers of attorney. The ICC regulations prescribe a simple method for compliance with the statute and declare that tariffs that do not comply with important statutory mandates are void. Stated in another way, the regulation defines the essential elements of an effective tariff that refers to other tariffs that govern its terms.

Although the use of voiding as a method of compliance is potentially a harsh measure, we are satisfied that the Commission has not exceeded its discretion by determining that tariffs are void if they fail to comply with formalities that serve important statutory purposes.[13] A stricter corrective measure – voiding tariffs *and* giving shippers an explicit right to overcharges – was upheld by the Supreme Court in *American Trucking* to remedy non-conforming tariffs. *American Trucking*, 467 U.S. 370, 104 S.Ct. at 2467. The public policy that the Commission seeks to enforce through the exercise of this mandate is one that has long been integral to the regulation of interstate commerce: the prevention of secrecy in the dealings among carriers and between carriers and favored shippers. Thus, we conclude that section 1312.4(d) was within the Commission's statutory authority.

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[13] We note that, of the vast number of technical requirements the Commission has placed on tariffs, only the requirement of formal participation is enforced with the voiding mechanism. We find no other regulation in which the ICC currently requires a carrier to comply with the regulation or find that its non-conforming tariff is "void as a matter of law."

Petitioner's rhetoric regarding the I.C.C.'s acceptance of tariffs with "irregularities" is to no avail in this case. Since freight charges cannot be calculated with only one half of the equation required by the terms of the tariff, the tariff is incomplete. Riss's violation goes to the heart of the filed rate doctrine as embodied in the Commission's regulations, and is distinguishable from the technical, superficial defects contemplated in *Genstar*, *Davis* and *Berwind-White*.

If the term "miles" is ambiguous, as suggested by Petitioner at p. 13 of its Petition for Writ of Certiorari, it is a general principle of tariff construction that ambiguities are to be resolved against the framer of the tariff (and its successor-in-interest). *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971).

Contrary to Petitioner's assertion, Congress did not intend to restrict the Commission's discretionary powers to those provided in 49 U.S.C. § 10762(e). (Petition for Writ of Certiorari at 8.) See n. 14 herein. The Court below did not interpret this section as prohibiting the Commission's promulgation of § 1312.4(d). It stated:

> Here, the remedy the ICC adopted under section 1312.4(d) is not the exercise of the power of rejection; rather it is a remedial power to declare a tariff void from the moment a carrier does not effectively concur or maintain a power of attorney to support its participation in a governing separate tariff. The remedial power in this case is in some respects broader than the remedy examined in *American Trucking*: it not only would apply to void a tariff ab initio because an effective concurrence or power of attorney did not exist when the tariff was filed; *it also allows the voiding of a tariff that was originally accompanied by the required concurrence or power of attorney at some later date if the concurrence or power of attorney becomes ineffective.*

K Mart, at 1524 (emphasis added). Thus, Riss's tariff 501-B was properly accepted for filing by the I.C.C. on August 20, 1984, became effective on Sept. 20, 1984, and was a complete tariff because Riss was a participant in HGCB 100 on that date. However, when Riss was deleted from HGCB 100 effective Feb. 19, 1985, its rate tariff was incapable of computing freight charges, and thus was ineffective and void.

IV. THE D.C. CIRCUIT'S DECISION IN *OVERLAND v. I.C.C.* UNDERCUTS THE FILED RATE DOCTRINE, AND THEREFORE, IS NOT CONTROLLING

As of this writing, the finality of the D.C. Circuit's decision in *Overland v. I.C.C.*, 996 F.2d 356, is pending because of a petition for rehearing. If *Overland* is reconsidered by the Circuit and reversed, as requested by the Government and Intervenors therein, the Sixth and Seventh Circuits which relied heavily on *Overland* may also be reconsidered and reversed, thus removing the divergent opinions of the Circuits. Respondent suggests, therefore, that it may be premature to rule on Petitioner's writ of certiorari until the D.C. Circuit disposes of *Overland*.

Overland is manifestly erroneous in that the Court *created* a distance guide tariff for Overland Express when none existed *in its name* in the I.C.C.'s official tariff file

after its participation was cancelled. Doing so contravenes this Court's admonition that "a federal court has no jurisdiction to enter an order that operates to fix rates." *Burlington Northern Inc. v. United States*, 459 U.S. 131, 140 (1982). That power is reserved solely to the I.C.C. The HGCB's cancellation of Overland's participation in its Mileage Guide Tariff was notice to Overland *and its shippers* that Overland could no longer use the distances in that guide for the computation of mileage rate charges. (See also the "Note" in the HGCB Mileage Guide Tariff, n. 11 herein.) The fact that Overland's rate tariff *remained* on file is irrelevant because it was lacking a lawful distance guide.

Illustrative of the D.C. Circuit's mis-understanding of how the filed rate doctrine works in this context, is the court's holding that

> The Carriers and the shippers are bound by that which is openly disclosed so as to prevent price discrimination. That purpose is hardly served, indeed it is undermined, by an ICC policy that would make the disclosed rate unreliable unless a shipper took the extraordinary step of determining whether a carrier's tariff filing was defective *because its power of attorney was not up to date.*

Overland, at 361 (emphasis added).

The law does not require shippers to look for carriers' powers of attorney to determine if a carrier is a party to a referred-to tariff. The law charges shippers with constructive notice only of *filed tariffs*, not powers of attorney which are *not* filed with the Commission. They are given to the publishing carrier along with the

required participation fee to authorize the tariff publisher to publish the carrier's name in the referred-to tariff as a participating carrier. *Jasper Wyman* at 253.

Only after receipt of the power of attorney and annual fee is that carrier listed in the referred-to tariff. It is immaterial whether or not shippers actually check the tariff, because shippers are charged with constructive notice of the contents of the tariff. *Maislin*, 127. *Absent a carrier's name in a tariff, that carrier may not rely upon that tariff as its own.*

Overland's name was not published as a participating carrier in the mileage guide and therefore the filed rate doctrine prohibits its use of the mileage rate tariff referring to the uniform mileage tariff – a necessary component of mileage rates.

This misapprehension of the role of powers of attorney when carriers elect to participate in joint tariffs was shared by the Seventh Circuit in *Brizendine*. See Petitioner's Petition for Writ of Certiorari, p. 16-17. The Third Circuit addressed this issue by discussing the roles of principals and agents. The Court concluded that Riss revoked its power of attorney

> . . . when it failed to make the required payment of participation fees because its failure to pay constituted conduct inconsistent with the continuance of its consent. We conclude that this manifestation of revocation rendered ineffective any power of attorney Riss may have issued. . . . HGB's cancellation of Riss's participation in its tariff unquestionably is conduct inconsistent with the continued performance of HGB's duties to Riss. Thus, we also conclude that, even absent

> a revocation by Riss, HGB's cancellation operated as a renunciation of authority rendering ineffective any power of attorney Riss may have once executed. . . . The filed rate doctrine . . . charges carriers and shippers alike with constructive knowledge of filed tariffs. HGB's cancellation, *filed in a supplement to its tariff*, afforded Riss sufficient notice of both the cancellation and HGB's renunciation of any power of attorney that may once have existed. *Jasper Wyman . . . A holding to the contrary would vitiate the filed rate doctrine.*

K Mart at 1523 (emphasis added).

> Under the relevant law, Riss's tariff was void when K Mart made its shipments in 1986 through 1989 because any power of attorney it previously may have issued became ineffective in 1985, 49 C.F.R. § 1312.4(d), and a void tariff cannot support the undercharges Riss seeks. . . .

Id. at 1524 (citations omitted). There is no "perpetual participation" in agents' tariffs. *Id.* at 1526.

Respondent respectfully submits that the Third Circuit's understanding of the use of powers of attorney with respect to joint tariffs is in accord with the law and that the D.C. Circuit's view violates the filed rate doctrine. The filed rate doctrine may be harsh on shippers, but it also governs carriers and their Trustees as well.

Overland also mischaracterized the Commission's mandate when it considered the *ATA* criteria for rejecting tariffs. (See Petitioner's Petition for Writ of Certiorari p. 15.) Although Respondent herein does not concede that *ATA* is applicable, the Commission's statutory mandate is

to regulate the publication of tariffs, in this case *joint* tariffs. See 49 U.S.C. § 10705(b)(1).

Brizendine (Trustee for Brown Transport) v. Cotter & Company, ___ F.2d ___, 1993 WL 292348 (7th Cir. Aug. 5, 1993), also misstates this Court's decision in *Maislin* by holding:

> *Maislin* adds that the filed rate doctrine trumps any contrary regulation promulgated by the I.C.C.

Id., 1993 WL 292348 *5. But the Commission's tariff regulations requiring the publication of distance scales is not contrary to the filed rate doctrine – it implements the doctrine. The Seventh Circuit's misapprehension is further illustrated by its statement that

> Again, Brown's tariff rate was not secret; anyone who consulted it could compute the price of shipping. The presence or absence of a separately filed power of attorney would change nothing.

Id., 1993 WL 292348 *6. On the contrary, *no one* who consulted Brown's filed tariff could calculate the lawful freight charges due on any given shipment without a uniform scale of distances published in Brown's name because it published only a rate per mile. The Sixth Circuit was similarly misled by *Overland*.

> While this court is not required to follow *Overland*, the ICC is. Since *Overland* will require the ICC to revisit the conclusions it reached in *Jasper Wyman*, we adopt the reasoning of the D.C. Circuit in *Overland*, and hold that so long as Security's tariff documents were received and placed on file by the ICC without any objection as to

> their form, and were adequate to give notice of the rate to be charged, the filed rate doctrine applies, and Security may rely upon the filed rates in a suit to collect undercharges. *Overland*, 1883 U.S. App. LEXIS 14833 at *18.

Security Services v. P-Y Transp., 1993 WL 325719 *4. Thus, the Court failed to realize that the "rate to be charged" is useless without a uniform distance scale in the carrier's tariff.

Even if a filed rate were involved, the rule would not *per se* contravene *Maislin*. While *Maislin* reaffirmed a carrier's right and duty to collect filed rates, 497 U.S. at 126-133, it also confirmed that carriers must comply with other express requirements of the Act, 497 U.S. at 128. Any doubt on this point was dispelled in *Reiter v. Cooper*, where the Court explained:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. . . . It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the [Act] itself.

Reiter at 1219.

In *I.C.C. v. Transcon Lines*, this Court vacated and remanded a Ninth Circuit ruling that the filed rate doctrine "trumps" the I.C.C.'s credit regulations. 990 F.2d 1503, 1513-1515, 61 U.S.L.W. 3684 (U.S. June 14, 1993) (No. 92-1547).

As in *Reiter* and *Transcon*, the powers asserted by the I.C.C. here are "specifically accorded" by the Act: in this

case, the authority to prescribe the manner of tariff filing, 49 U.S.C. § 10762(b)(1) and necessary tariff information, 49 U.S.C. § 10762(a)(1), to promulgate implementing rules, 49 U.S.C. § 10321(a), and to enforce those rules, 49 U.S.C. § 11702(a)(5). The Commission promulgated regulations pursuant to these sections of the Act and in the spirit of the filed rate doctrine's public notice requirement. *K Mart* at 1521 (discussion of relevant regulations).

V. DEFERENCE MUST BE GIVEN TO ADMINISTRATIVE AGENCY REGULATIONS AND ITS INTERPRETATION THEREOF

When a court determines Congress has not directly addressed the precise question in issue, it may not impose its own construction on the statute. The question for the court is "whether the agency's answer is based on a permissible construction of the statute". *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In the case at bar, the I.C.C. promulgated tariff publishing regulations in response to Congress's mandate to implement the filed rate doctrine. Thus, the I.C.C. formulated rules to fill the gap left by Congress. With respect to tariff construction rules, there was an express delegation of authority to the Commission. 49 U.S.C. § 10762(a)(1) specifically requires motor common carriers to publish and file tariffs containing rates, and empowers the I.C.C. to "prescribe other information that motor common carriers *shall* include in their tariffs." 49 U.S.C. § 10762(a)(1) (emphasis added).

In response to this express delegation of authority, the I.C.C. crafted 49 C.F.R. § 1312 based on its extensive

experience and expertise in rates and tariffs. The Third Circuit's decision below carefully considered the I.C.C.'s interpretation, in *Jasper Wyman*, of its regulations governing mileage rates and incorporating agents' tariffs by reference, and concluded that the Commission's regulations and interpretations were sound and in accord with its Congressional mandate. *K Mart* at 1524-1527.

Agency rules must be affirmed unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972). This standard is extremely deferential and narrow; it forbids courts to inquire into whether the agency's decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency. *Id.* To fall short of this deferential standard, the agency's explanation must be "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). This is particularly so where, as here, Congress has specifically charged the agency to establish rules (in this case to govern tariff filing, 49 U.S.C. § 10762(b)(1)); in this situation this Court has found the agency to be operating "at the zenith of its powers" and its regulations to be "entitled to 'more than mere deference or weight.' " *See American Trucking Ass'ns. v. United States*, 627 F.2d 1313, 1320 (D.C. Cir. 1980), citing *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

> [W]hen construction of an administrative regulation rather than a statute is in issue, deference to administrative interpretation is even more clearly in order. . . . 'The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' . . . .

Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

In *Jasper Wyman*, the Commission gave full effect to the plain meaning of the word "void" in § 1312.4(d). That interpretation clearly does not conflict with the "plain language" of the relevant regulations. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394 (March 25, 1992).

CONCLUSION

This Court recently insisted upon a strict application of the filed rate doctrine when carriers and their successors in interest seek the collection of undercharges. *Maislin*, at 130. Respondent herein is entitled to the same standard when applied to Petitioner's mileage rate tariff upon which its claims are based.

The Third Circuit, as well as the Fifth and Eighth Circuits, recognized that when carriers' participation in the HGCB's Mileage Tariff expires, the carrier no longer has a uniform scale of distances in a filed tariff, and therefore, its mileage rates are incomplete. Without a complete tariff on file, Petitioner has no cause of action.

Because the Third Circuit's decision below accords with the filed rate doctrine, the Court need not grant *certiorari* unless the D.C. Circuit refuses to rehear and reverse *Overland v. I.C.C.*, which was relied upon by the Sixth and Seventh Circuits. If, however, rehearing is

denied by the D.C. Circuit, *certiorari* should be granted in this case to resolve the conflict among the Circuits.

Respectfully submitted,

WILLIAM J. AUGELLO

September 17, 1993

APPENDIX A

CARRIERS THAT DID NOT PARTICIPATE IN AGENTS' TARIFFS REFERRED TO IN THEIR TARIFFS

American Eagle Lines
ATF Trucking Co., Inc.
BGR Transportation Co., Inc.
Brown Transport Truckload, Inc.
Canny Trucking Co., Inc.
Casket Distributors
Columbia Navigation
Country Wide Trucking
Cross E Transportation
Emporia Truck Lines
Express Transportation Co.
F.P. Corp.
Freightcor Services, Inc.
J. H. Ware
Mistletoe Transportation
Mitchell Trucking
Northeast Carriers, Inc.
Overland Express, Inc.
R.W. Joyce
Riss International Corp.
Rose Freight Lines
Rose-Way, Inc.
Sam Tanksley Trucking, Inc.
Silvey Refrigerated Carriers, Inc.
Sooner Express
Squaw Transit Co.
Transportation Systems International, Inc.
True Transport Co.
Twin Continental
United Shipping
Winning Run, Inc.
Zurek Express

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

Overland Express, Inc., September Term, 1992

Petitioner

v.

Interstate Commerce Commission,

Respondent

ORDER

(Filed Aug. 17, 1993)

It is Ordered, *sua sponte*, that petitioner respond to respondents' suggestion for rehearing *en banc* and do so on or before September 3, 1993.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION.

CANCELLATION OF PARTICIPATION IN AGENCY TARIFFS

OCTOBER 30, 1939.

To All Motor Carriers Subject to Section 217 of the Motor Carrier Act. 1935:

So many tariff complications and possibly unwitting violations of the law result from the cancelation of the participation of motor carriers in agency tariffs, including classification publications, that it is necessary to call the attention of all interstate common carriers by motor vehicle and their publishing agents to their obligations in this respect.

The law requires that all common carriers shall file with the Commission, and keep open to public inspection tariffs containing all their rates, fares, and charges for transportation and all services in connection therewith. Many carriers have complied with this obligation by participating in agency tariffs filed by agents who act in accordance with the by-laws of bureaus, conferences, or other organizations of motor carriers. Upon failure of a carrier to pay the established dues of such organization, or to comply with the by-laws, in many instances the agent proceeds to cancel the carrier's participation in the agency issues. Such cancelation makes the use of rates in such tariffs by that carrier unlawful. It is likewise unlawful for common carriers to perform interstate transportation without lawful rates on file covering the services performed. Therefore, the carrier must arrange to establish, effective on the same date that its participation in the

agency issue is canceled, rates for the transportation services which it may lawfully perform and for which it does not otherwise have rates filed.

An individual carrier may publish its own tariffs to take the place of those formerly published by its agent, or it may arrange to have its rates published by another agent, or republished by the agent who canceled them.

A tariff containing a classification of commodities is actually a part of any class rate tariff which is made subject to such classification tariff. Therefore, a carrier that is a party to a rate tariff which refers to a classification tariff must also be a party to the classification tariff.

If a carrier's participation in a classification tariff is canceled, that carrier's class rate tariff then becomes incomplete because there is no proper method of determining the commodities upon which the various class rates apply. Therefore, if a carrier's participation in the classification tariff is cancelled, it is necessary that the carrier publish an individual classification of commodities, or arrange for participation in some other classification tariff, or be reinstated in the tariff from which it has been canceled. In instances where a carrier elects to use a different classification, it will be necessary for the carrier to correct each of its class rate tariffs to provide reference to the new classification tariff to which the rate tariffs are made subject.

It should not be assumed that the Commission will grant special permission for the reestablishment of canceled carrier rates or reinstatement of canceled carrier participation in agency issues on short notice when the carrier's participation has been canceled because of a

controversy between a carrier and its agent, bureau, or association. Therefore, any agent who proposes to cancel the participation of a carrier in his class tariff or classification should notify the carrier of such proposed cancelation sufficiently in advance of the effective date thereof to permit the carrier to file an individual tariff or arrange with another agent for the publication of its rates on full statutory notice, effective on the same date as that of cancelation. The agent should also furnish the carrier with a sufficient number of copies of the canceling publication, to permit proper posting.

[SEAL]

W.P. BARTEL,
Secretary.

(P.R. Doc. 39-4016: Filed, October 30, 1939: 12:36 p.m.]

4 Fed. Reg. 4440 (Oct. 31, 1939)

APPENDIX D

RISS INTERNATIONAL CORPORATION
Tariff No. 501-B
APPLICATION OF RATES

ITEM 161

APPLICATION OF RATES (Applicable only where reference is made hereto) . . .

Where reference is made hereto, the charge will be as shown in Part A but, in no case less than the charge shown in Part B of this item.

PART A

When Applicable Rate Basis Number Is:	CHARGE Shall Be:
1 to 50	364.00
51 to 100	438.00
101 to 150	516.00
151 to 200	583.00
201 to 250	657.00
251 to 300	730.00
301 to 350	802.00
351 to 400	877.00
401 to 450	949.00
451 to 500	1021.00
501 to 550	1096.00
551 to 600	1169.00
601 to 650	1243.00
651 to 700	1315.00
701 to 750	1389.00
751 to 800	1463.00
801 to 850	1535.00
851 to 900	1609.00
901 to 950	1682.00
951 to 1000	1755.00
1001 to 1050	1828.00

1051 to 1100	1891.00
1101 to 1150	1975.00
1151 to 1200	2049.00
1201 to 1250	2121.00
1251 to 1300	2194.00
1301 to 1350	2268.00
1351 to 1400	2340.00
1401 to 1450	2413.00
1451 to 1500	2487.00
1501 to 1550	2561.00
1551 to 1600	2633.00
1601 to 1650	2707.00
1651 to 1700	2780.00
1701 to 1750	2853.00
1751 to 1800	2926.00
1801 to 1850	2999.00
1851 to 1900	3072.00
1901 to 1950	3146.00
1951 to 2000	3219.00
2001 to 2050	3292.00
2051 to 2100	3366.00
2101 to 2150	3438.00
2151 to 2200	3511.00
2201 to 2250	3585.00
2251 to 2300	3659.00
2301 to 2350	3732.00
2351 to 2400	3805.00
2401 to 2450	3878.00
2451 to 2500	3951.00
2501 to 2550	4024.00
2551 to 2600	4097.00
2601 to 2650	4172.00
2651 to 2700	4244.00
2701 to 2750	4317.00
2751 to 2800	4391.00
2801 to 2850	4464.00
2851 to 2900	4536.00

2901 to 2950	4610.00
2951 to 3000	4683.00
3001 to 3050	4756.00
3051 to 3100	4830.00
3101 to 3150	4903.00
3151 to 3200	4976.00
3201 to 3250	5049.00
3251 to 3300	5122.00
3301 to 3350	5195.00
3351 to 3400	5269.00
3401 to 3450	5342.00
3451 to 3500	5415.00

Issued: August 28, 1986

Effective: September 3, 1986

Issued By: Robert L. Burns, Traffic Manager,
P.O. Box 100, Kansas City, Mo 64141
For explanation of abbreviat symbols, see page 3.

APPENDIX E

STATUTES INVOLVED

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

49 U.S.C. § 10321. Powers

(a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

49 U.S.C. § 10705. Authority: through routes, joint classifications, rates and divisions prescribed by Interstate Commerce Commission

(b)(1) The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications,

joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a motor common carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title with another such carrier or with a water common carrier of property.

49 U.S.C. § 10741. Prohibitions against discrimination by common carriers

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

49 U.S.C. § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the

use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762. General tariff requirements

(a)(1) . . . A motor common carrier shall publish and file with the commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.

49 U.S.C. § 10762(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section.

49 U.S.C. § 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action –

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title . . .

REGULATIONS CITED

49 C.F.R. § 1312.4(d): *Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10.

49 C.F.R. § 1312.10(a): *Powers of attorney.* Powers of attorney may be given by a carrier to a carrier or an agent for the purpose of publishing and filing tariffs. . . . The power may be as broad or limited as expressed in the document, and alternate agents may be named. **Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person.** Revocation or amendment of the power of attorney should be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed. If the scope of a power of attorney is questioned by any person, the document shall be produced. (emphasis added)

49 C.F.R. § 1312.13(c) ***Participating carriers.*** **(1)** (This paragraph does not apply to carriers' local tariffs.) Unless a separate participating carrier's tariff is filed, a list of the participating carriers shall be provided, showing the names of the carriers; the city and state of the principal

office of the carrier; and the lead docket number of each carrier's operating authority, if any.

49 C.F.R. § 1312.17 Amendments (a) *How made.* An amendment is a change in, addition, or cancellation from a tariff. Supplements are tariff publications to be used to amend bound tariffs (see § 1312.18) and new or revised pages are tariff publications to be used to amend looseleaf tariffs (see paragraph (d) of this section). Supplements may also be used to amend looseleaf tariffs as provided in paragraph (d)(16) of this section.

(b) *Lists of participating carriers.* (This paragraph does not apply to participating carrier tariffs.)

(1) In bound tariffs, the list shall be amended by –

(i) Publishing a complete new list containing all changes and canceling the prior list; or

(ii) Publishing a cumulative list of all changes, alphabetically arranged either by code or carrier name, and the statement: "The list of participating carriers is as shown in the tariff except for the following changes." Only one cumulative list may be in effect at one time. A carrier's participation shall be canceled by showing the carrier's complete name, together with the word "Cancel" or other suitable provision. Changes shall be carried forward in subsequent amendments to the list as reissued matter.

(2) In a looseleaf tariff, the list shall be amended either by (i) republication of the page(s) on which the list appears, indicating the cancellations, additions and

changes. The canceled carriers' names shall be republished on a separate page(s) at the end of the list, indicating when the cancellation was first effective, until all provisions in the tariff referring specifically to the carrier(s) have been removed from the effective pages. The pages containing the list shall refer to the page(s) with an appropriate symbol to show elimination of a carrier.

(3) Concurrent with the cancellation of a carrier from the participating carrier list, all provisions specifically referring to that carrier shall be appropriately amended unless –

(i) The cancellation is in connection with the publication of a complete adoption of the rates of that carrier by another (see § 1312.20); or

(ii) The method permitted in paragraph (b)(4) of this section is used.

(4) A carrier's participation may be canceled by publishing a blanket cancellation notice directly with the list of participating carriers, and referring to the notice when canceling the carrier's name from the list. If this method is used, all provisions specifically referring to that carrier shall be amended as soon as possible. During the interim, an item or provision which specifically refers to that carrier may not be republished unless the reference is concurrently removed.

49 C.F.R. § 1312.18 Supplements

(a) *Changing provisions of a bound tariff.* A supplement may be used to add, delete or change provisions of a bound tariff. General rules, in addition to rules applicable to tariffs as a whole, are provided below.

49 C.F.R. § 1312.25(a) *Separate tariffs may be filed by agents.* (1) An alphabetical list of carriers participating in agent's tariffs, along with a description of the underlying tariffs, may be filed in a separate tariff(not a rate tariff). The title page of the participating carrier tariff shall state that it applies only in connection with tariffs referring to it. If the tariff governs tariffs issued jointly by two or more agents, it shall be ajoin issue (see § 1312.11).

49 C.F.R. § 1312.25(d) *Cancellation of participating carriers.* (1) Except as provided in paragraph (f) of this section, when a carrier's participation in a participating carrier tariff or governed tariff is canceled, **all reference to the carrier in the involved tariff(s) shall be canceled**.

(2) The cancellation may be accomplished either by –

(i) Amending all matter to eliminate reference to the carrier; or

(ii) Publishing a blanket cancellation notice.

The blanket cancellation shall be published in the participating carrier tariff and shall be referred to in the cancellation of the carrier's name. A provision referring to the canceled carrier may not be republished without concurrent cancellation of the reference to that carrier and all matter shall be amended as soon as possible.

(3)(i) In a bound tariff the canceled carrier's name (and reference to the blanket cancellation notice, if used) shall be carried forward as reissued matter in the list of participating carriers.

(ii) In a looseleaf tariff, the carrier's name (and reference to the blanket cancellation notice, if used) and

the date the cancellation became effective shall be republished in successive issues of the list of participating carriers until all provision referring to the carrier are amended. (emphasis added)

49 C.F.R. § 1312.27(e): *Participation in governing publications.* Carriers participating in tariffs which refer to, and are governed by, separate tariffs (classifications, exceptions, rules etc.) **shall also participate in those governing separate tariffs,** unless specifically stated in the governed tariffs that provisions in the separate tariffs will not apply for their account. (emphasis added)

49 C.F.R. § 1312.30(b): *Method of Showing Distances.* Distance rates may be published to apply per vehicle per mile, or other unit per mile, or by establishing a rate table or segment showing a **scale of distances** for which charges will be applied. If the latter method is used, a rate shall be provided for each distance. Each State or area covered by the application of the rates shall be listed. The listing may be brief but informative as to the territorial coverage. (emphasis added)

49 C.F.R. § 1312.30(c): *Determination of distances.* (1) A tariff containing distance rates **shall contain provisions for the determination of distances by –**

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) **Referring to a distance guide(s).** (emphasis added)

49 C.F.R. § 1312.30(c)(4): Except as provided in § 1312.13(e)(2), **only distance guides officially on file**

with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide. (emphasis added)